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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BUDDY SELBY and VANESSA SELBY
Plaintiffs,

v.

FOREMOST SIGNATURE INSURANCE
COMPANY, a Michigan Stock
Company, MOORE CUSTOM HOMES,
INC., a Washington Corporation,
and GREAT AMERICAN INSURANCE
COMPANY BOND NUMBER 2493551,

Defendants.

NO. CV-10-337-EFS

**ORDER GRANTING PLAINTIFFS'
MOTION TO REMAND ACTION TO
SPOKANE COUNTY SUPERIOR COURT
AND DENYING DEFENDANT'S MOTION
TO STRIKE PLAINTIFFS' FOURTH
AMENDED COMPLAINT**

Before the Court, without oral argument, is Plaintiffs Buddy and Vanessa Selby's Motion to Remand Action to Spokane County Superior Court (ECF No. [10](#)) and Defendant Foremost Insurance Company's ("Foremost Insurance") Motion to Strike Plaintiffs' Fourth Amended Complaint against Foremost and Moore Custom Homes and Great American Insurance Bond Number 2493551 (ECF No. [11](#)). After reviewing the submitted material and applicable legal authority, the Court is fully informed and grants Plaintiffs' motion to remand and denies Defendant Foremost Insurance's motion to strike.

ORDER - 1

A. BACKGROUND

On April 26, 2010, Plaintiffs Buddy and Vanessa Selby, Washington residents, filed an action in Spokane County Superior Court,¹ seeking damages for alleged damage to their Spokane-Valley home's roof. The Complaint asserted claims against Atwood Roofing and Old Republic Insurance Company Bond No. YL126353 ("Old Republic"). (ECF No. 13-1, Ex. A.) On July 30, 2010, Plaintiffs filed a First Amended Complaint, adding Foremost Insurance as a defendant. *Id.* Ex. B. Plaintiffs amended their complaint again on August 2, 2010, without adding defendants. *Id.* Ex. C. Then, on September 28, 2010, Plaintiffs filed a Third Amended Complaint, dismissing Atwood Roofing and Old Republic. *Id.* Ex. D.

On September 29, 2010, the only remaining defendant, Michigan-company Foremost Insurance, removed the action to this Court based on federal diversity jurisdiction.

In October 2010, Plaintiffs discovered that a Moore Custom Homes, Inc. ("Moore Custom Homes") employee had failed to reconnect a dryer vent in their laundry room while repairing their water-damaged bathroom in December 2009. A mold expert who was hired by Plaintiffs found critically high levels of mold spores and, based on a Foremost Insurance-funded inspection, Plaintiffs believe that improper ventilation in the laundry room was a proximate cause of the claimed damages. As a result, Plaintiffs filed a Fourth Amended Complaint (ECF

¹ That case was filed under the Spokane County Superior Court cause number 2010-02-011645-1.

1 Nos. 6 & 9) in this Court, adding Moore Custom Homes, a Washington
2 corporation, and its bonding company, Great American Insurance Company
3 Bond Number 2493551 ("Great American"), as defendants. The Fourth
4 Amended Complaint alleges that Moore Custom Homes did not adequately
5 perform and complete the bathroom repair and that the damage resulted
6 from a "covered event" under the Foremost Insurance policy. This was
7 the first amended complaint filed in federal court after Foremost
8 Insurance removed the action.

9 **B. ANALYSIS**

10 Plaintiffs move to remand this case to state court because, after
11 joinder of Moore Custom Homes and Great American as defendants, complete
12 diversity is lacking. Foremost Insurance opposes the motion, arguing
13 that Plaintiffs' joinder of nondiverse parties in its Fourth Amended
14 Complaint, which Foremost Insurance agrees removes this court's
15 jurisdictional basis, was improper because Plaintiffs did not seek leave
16 of court.

17 As an initial matter, the Court concludes that removal was proper
18 because complete diversity existed at the time of removal: Plaintiffs
19 are Washington residents while Foremost Insurance, the only defendant at
20 the time of removal, is a Michigan stock company. See 28 U.S.C. §
21 1441(a) (recognizing that an action filed in state court may be removed
22 only if the federal district court has original jurisdiction); *id.* §
23 1332(a) (defining diversity jurisdiction as having an amount in
24 controversy exceeding \$75,000 and between citizens of different states);
25 *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-74 (1978)
26 (requiring complete diversity of citizenship); *Yniques v. Cabral*, 985
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1 F.2d 1031, 1035-36 (9th Cir. 1993) (recognizing that a federal court
2 loses diversity jurisdiction when nondiverse party is joined or
3 intervenes in the action). Having found that removal was proper, the
4 Court addresses first whether Plaintiffs properly amended as a matter of
5 right, and second, whether that amendment adding two nondiverse parties
6 requires remand.

7 **1. Foremost Insurance's Motion to Strike**

8 Foremost Insurance argues that Plaintiffs were required to seek
9 leave of court before adding Moore Custom Homes and Great American as
10 defendants because this was their Fourth Amended Complaint. Plaintiffs
11 counter that the Fourth Amended Complaint was actually the first
12 complaint filed in federal court, and thus was properly filed without
13 the Court's approval. The Court finds that Plaintiffs properly filed
14 their Fourth Amended Complaint without leave of court.

15 Federal Rule of Civil Procedure 15 addresses amendments to
16 pleadings and permits a party "to amend its pleading once as a matter of
17 course" within 21 days after serving it or 21 days of service of an
18 answer. Fed. R. Civ. P. 15(a)(1) (2010). In all other cases, a party
19 may amend its complaint only by leave of court or by written consent of
20 the adverse party; leave shall be freely given when justice so requires.
21 *Id.* at 15(a)(2). Because the Federal Rules govern civil actions removed
22 from a state court after removal, *id.* at 81(c), "[a]mendment of a
23 pleading after removal is allowed if the amendment would have been
24 permitted had the suit originated in federal court." 3-15 Moore's
25 Federal Practice - Civil § 15.16[5] (2010) (citing *Freeman v. Bee Mach.*
26 Co.

27 , 319 U.S. 448, 451-52 (1943)). Accordingly, following removal, a

1 party may amend its pleading as a matter of course within twenty-one
2 (21) days of service of defendant's answer.

3 Here, Foremost Insurance filed its Answer (ECF No. [4](#)) on October
4 20, 2010. Plaintiffs filed their Fourth Amended Complaint, the first
5 amended complaint in federal court, on November 10, 2010, and within
6 twenty-one (21) days after Foremost Insurance's Answer, the first answer
7 in either court. Thus, Plaintiffs were not required to seek leave of
8 court before adding Moore Custom Homes and Great American. Accordingly,
9 Foremost Insurance's motion to strike is **DENIED**.

10 **2. Plaintiffs' Motion to Remand**

11 Foremost Insurance argues that Plaintiffs' addition of two
12 nondiverse parties after Foremost Insurance removed the action to
13 federal court was done solely to destroy diversity jurisdiction.
14 Plaintiffs maintain that they did not discover Moore Custom Homes'
15 alleged negligence until October 2010, after Foremost Insurance removed
16 this action to federal court, and thus did not add those parties solely
17 to destroy diversity.

18 The Court finds that Plaintiffs' addition of two nondiverse
19 defendants after removal was not improper and requires remand to state
20 court. Post-removal joinder of nondiverse defendants, even those that
21 are not indispensable, destroys diversity jurisdiction and requires
22 remand. See 16-107 Moore's Federal Practice - Civil § 107.14[2](c)
23 (2010) (citing *Cobb v. Delta Exports, Inc.*, 186 F.3d 675, 677-678 (5th
24 Cir. 1999)). This allows plaintiffs to reinstate their initial choice of
25 forum. See 28 U.S.C. § 1447(e). Here, Plaintiffs added two nondiverse
26 parties, Moore Custom Homes and Great American, after Foremost Insurance
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1 properly removed this action to federal court. The addition of these
2 parties destroyed the complete diversity necessary for this Court to
3 maintain jurisdiction. The Court finding no evidence that Plaintiffs'
4 claims against Moore Custom Homes and Great American are without merit,²
5 the Court **GRANTS** Plaintiffs' motion and **REMANDS** this action to Spokane
6 County Superior Court.

7 **III. CONCLUSION**

8 Accordingly, **IT IS HEREBY ORDERED:**

9 1. Plaintiffs' Motion to Remand Action to Spokane County Superior
10 Court (**ECF No. 10**) is **GRANTED**.

11 2. Defendant Foremost Insurance Company's Motion to Strike The
12 Selbys' Fourth Amended Complaint against Foremost and Moore Custom Homes
13 and Great American Insurance Bond Number 2493551 (**ECF No. 11**) is **DENIED**.

14 **IT IS SO ORDERED.** The District Court Executive is directed to:

15 1. Enter this Order;
16 2. Provide copies of this Order to counsel;
17 3. Provide a certified copy of this Order to the **Clerk of the**
18 **Spokane County Superior Court of the State of Washington**, Civil Cause
19 No. 2010-02-011645-1;

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21
22 ² There is no evidence indicating that Plaintiffs amended their
23 complaint in bad faith or for an improper purpose: Plaintiffs
24 discovered the facts underlying their negligence claim against Moore
25 Custom Homes and its bonding company, Great American, after removal,
26 and those facts and legal issues overlap with their claims against
27 Foremost Insurance.

4. **REMAND THIS CASE** to the Spokane County Superior Court of the State of Washington; and

5. CLOSE THIS FILE.

DATED this 4th day of January 2011.

S/ Edward F. Shea
EDWARD F. SHEA
UNITED STATES DISTRICT JUDGE

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